

NO. 12-24-00347-CV

IN THE COURT OF APPEALS

TWELFTH COURT OF APPEALS DISTRICT

TYLER, TEXAS

***BAKER & COMPANY
CONSTRUCTION, LLC,
APPELLANT***

§ APPEAL FROM THE 114TH

§ JUDICIAL DISTRICT COURT

V.

***SMITH COUNTY, TEXAS,
APPELLEE***

§ SMITH COUNTY, TEXAS

MEMORANDUM OPINION

Baker & Company Construction, LLC appeals the trial court's order granting Appellee Smith County, Texas's plea to the jurisdiction. In two issues, Baker argues that the trial court erred in granting the County's plea to the jurisdiction because it presented more than a scintilla of evidence in response to the County's plea that it entered into a contract for construction services with the County and sought damages compensable under Texas Local Government Code, Section 267.007. We reverse and remand.

BACKGROUND

In early 2020, the County solicited public bids for a construction project to widen and improve Wood Springs Road, which is located within the city limits of Lindale, Texas (the project). Based on its bid, Baker was selected and, on February 25, 2020, entered a construction services contract with Smith County for paving and drainage improvements to Wood Springs Road.

Before the project began, it was known that certain utility poles were in the path of construction and would have to be moved by Oncor. The record reflects that the County repeatedly communicated with Oncor about the need to relocate these utility poles so as to not interfere with the project. Nonetheless, on May 4, 2020, before Oncor could relocate all the utility poles in the project's path, the County instructed Baker to commence working on the project.

Baker began working on the project, but continually encountered utility poles, which disrupted its work plan. By April 9, 2021, due to the utility poles which remained in the project's path, Baker requested and the County ordered that work on the project be suspended¹ until Oncor could remove the remaining utility poles. During this time, while Baker still performed limited work and maintenance on the site, it demobilized its workforce and equipment so it could work on other projects.

In late October, the County notified Baker that Oncor removed the remaining utility poles and the project could proceed. Baker remobilized its equipment and workforce to re-commence work on the project. But in January 2022, Baker damaged a water main owned by the City of Lindale,² and it was determined that the water main would have to be lowered before the project could proceed further. Baker offered to perform the work itself, but ultimately, the City of Lindale opted to perform the work. Accordingly, the County ordered that work on the project again be suspended, and Baker, once more, demobilized its equipment and its workforce.

On April 12, the County notified Baker that the City of Lindale's work on the water main was complete and work on the project again could proceed. Baker again mobilized its equipment and workforce and, ultimately, completed the project.

¹ In its brief, the County characterizes the cessation of work ordered as an "abatement." But Bryan Johnson, the representative for the County's Engineer, in his deposition testimony, referred to work as having been "suspended." Thus, we will refer to it as such.

² There is conflicting testimony in the record regarding whether this water main was within or below the subgrade.

During the first work-suspension period, Baker contacted C.T Brannon Corporation (Brannon or the Engineer), the authorized representative for the County's Engineer, and requested reimbursement for costs it incurred as a result of the project delay. In late January 2022, during the second work-suspension period, Baker sent an email to the representatives of the County and the Engineer to request a meeting to discuss the outstanding requested amounts incurred due to the project delays.

When, upon the completion of the project, the County declined to compensate Baker for these delays in the amounts Baker requested, Baker filed the instant suit for breach of contract and sought damages stemming from the delays. After discovery was conducted and the trial date neared, the County filed a plea to the jurisdiction, in which it challenged many of Baker's pleaded, jurisdictional facts related to damages pursuant to Texas Local Government Code, Section 262.007(b). Baker filed a response, in which it cited to evidence it argued supported the challenged jurisdictional facts. Following a hearing on the matter, the trial court granted the County's plea to the jurisdiction, and this interlocutory appeal followed.³

PLEA TO THE JURISDICTION

In its first and second issues, Baker argues that the trial court erred in granting the County's plea to the jurisdiction because it pleaded and, in response to the County's plea, provided more than a scintilla of evidence that (1) it entered into a contract with the County for construction services, which meets the criteria for waiver of immunity under Section 267.007(a), which the County breached, and (2) it suffered damages compensable under Section 267.007(b).

Standard of Review

A plea to the jurisdiction is a dilatory plea by which a party challenges the trial court's subject matter jurisdiction. *Harris Cty. v. Sykes*, 136 S.W.3d 635, 638 (Tex. 2004); *Bland Indep. Sch. Dist. v. Blue*, 34 S.W.3d 547, 554 (Tex. 2000). Its purpose is to defeat a cause of action without regard to whether the claims asserted have merit. *Blue*, 34 S.W.3d at 554. The trial court's ruling on a plea to the jurisdiction is subject to de novo review. *Suarez v. City of Texas City*, 465 S.W.3d 623, 632 (Tex. 2015).

A plea to the jurisdiction may challenge either the sufficiency of jurisdictional allegations in the pleadings or the existence of jurisdictional facts. *Tex. Dep't of Parks & Wildlife v.*

³ See TEX. CIV. PRAC. & REM. CODE ANN. § 51.014(a)(8) (West Supp. 2024).

Miranda, 133 S.W.3d 217, 226–27 (Tex. 2004). When a plea to the jurisdiction challenges the sufficiency of the pleadings, we determine whether the plaintiff has met that burden by pleading facts that affirmatively demonstrate the trial court’s subject matter jurisdiction. *Id.* at 226. In so doing, we construe the pleadings liberally in favor of the plaintiff, look to the pleader’s intent, and accept as true the factual allegations in the pleadings. *Id.* at 226, 228. If the pleadings are insufficient to establish jurisdiction but do not affirmatively demonstrate an incurable defect, then the issue is one of pleading sufficiency and the plaintiff should be afforded the opportunity to amend. *State v. Holland*, 221 S.W.3d 639, 643 (Tex. 2007); *Miranda*, 133 S.W.3d at 226–27. On the other hand, if the pleadings affirmatively negate the existence of the trial court’s jurisdiction, then a plea to the jurisdiction may be granted without allowing the plaintiff an opportunity to amend. *Miranda*, 133 S.W.3d at 226–27.

When a plea to the jurisdiction challenges the existence of jurisdictional facts, we consider relevant evidence submitted by the parties to the extent necessary to resolve the jurisdictional issues, just as the trial court is required to do. *Id.* at 227. When a plea to the jurisdiction includes evidence, and the jurisdictional challenge implicates the merits of the plaintiff’s cause of action, the trial court will review the relevant evidence to determine whether a fact issue exists. *Id.* If the evidence presents a jurisdictional fact question, a plea to the jurisdiction may not be granted and the fact finder should resolve the fact issue. *Id.* at 228. If, however, the relevant evidence is undisputed or fails to raise a fact question on the jurisdictional issue, then the plea to the jurisdiction may be ruled on as a matter of law. *Id.*

In this latter circumstance, our standard of review generally mirrors the standard of review for traditional summary judgment. See *Harris Cent. Appraisal Dist. v. Houston Pipe Line Co LP*, 706 S.W.3d 568, 573 (Tex. App.–Houston [1st Dist.] 2024, no pet.). Thus, the movant has the initial burden of proof to show the trial court lacks jurisdiction. *Tex. Health & Human Servs. Comm’n v. Pope*, 674 S.W.3d 273, 281 (Tex. 2023). If the movant carries its burden, the nonmovant must show that a genuine issue of material fact exists as to the jurisdictional dispute. *Id.* If the nonmovant shows that a genuine issue of material fact exists, the plea must be denied. *Id.* Otherwise, the plea must be granted. See *id.* (stating that court must grant plea if nonmovant does not dispute movant’s proof or fails to raise fact issue). But importantly, a plea to the jurisdiction does not authorize an inquiry so far into the substance of the claims that plaintiffs

would be required to put on their case to establish jurisdiction. *See Pepper Lawson Horizon Int'l Group, LLC v. Tex. S. Univ.*, 669 S.W.3d 205, 211 (Tex. 2023).

Section 262.007

Baker alleges that the County waived immunity from suit pursuant to Texas Local Government Code, Section 262.007. Section 262.007 provides, in pertinent part, that a county that is a party to a written contract for construction services or goods related thereto may be sued on a claim arising under the contract. *See* TEX. LOC. GOV'T CODE ANN. §262.007(a) (West 2016). But the total amount of money recoverable from a county on a claim for breach of such a contract is limited to, among other things, the balance due and owed by the county under the contract. *See id.* § 262.007(b)(1).

Contractual Construction

To determine whether Section 262.007 applies, we must interpret certain provisions of the parties' contract. In construing a written contract, the primary concern of the court is to ascertain the true intentions of the parties as expressed in the instrument. *Coker v. Coker*, 650 S.W.2d 391, 393 (Tex. 1983); *see also Nat'l Union Fire Ins. Co. of Pittsburgh, PA v. CBI Indus., Inc.*, 907 S.W.2d 517, 520 (Tex. 1995). To achieve this objective, we must examine and consider the entire writing in an effort to harmonize and give effect to all the provisions of the contract so that none will be rendered meaningless. *See Coker*, 650 S.W.2d at 393; *CBI Indus.*, 907 S.W.2d at 520. No single provision taken alone will be given controlling effect; rather, all the provisions must be considered with reference to the whole instrument. *See Coker*, 650 S.W.2d at 393; *CBI Indus.*, 907 S.W.2d at 520; *Myers v. Gulf Coast Minerals Mgmt. Corp.*, 361 S.W.2d 193, 196 (Tex. 1962).

If the written instrument is so worded that it can be given a certain or definite legal meaning or interpretation, then it is not ambiguous, and the court will construe the contract as a matter of law. *Coker*, 361 S.W.2d at 393. The interpretation of an unambiguous contract is a question of law, which we review de novo. *See MCI Telecomm. Corp. v. Tex. Utils. Elec. Co.*, 995 S.W.2d 647, 650 (Tex. 1999). Ambiguity does not arise simply because the parties advance conflicting interpretations of the contract; rather, for an ambiguity to exist, both interpretations must be reasonable. *Lopez v. Munoz, Hockema & Reed, L.L.P.*, 22 S.W.3d 857, 861 (Tex. 2000).

In interpreting a contract, we must presume that the parties thereto intended every clause to have some effect; therefore, we consider each part of the document with every other part of the document so that the effect and meaning of one part on any other part may be determined. *See*

Birnbaum v. SWEPI LP, 48 S.W.3d 254, 257 (Tex. App.–San Antonio 2001, pet. denied). Moreover, we give terms their plain, ordinary, and generally-accepted meaning unless the instrument shows that the parties used such terms in a technical or different sense. *Id.* Finally, we enforce an unambiguous agreement as written. *Id.* We are not permitted to rewrite an agreement to mean something it did not. *Id.* We cannot change the contract simply because we or the parties come to dislike its provisions or think that something else is needed in it. *See id.* Parties to a contract are masters of their own choices and are entitled to select what terms and provisions to include in or omit from a contract. *Id.*

Here, while neither party argues that the agreement is ambiguous, each, at times, interprets its language differently, and neither concedes that its interpretation of the relevant passages is any less reasonable than the other party’s interpretation.

Discussion

Baker alleges it suffered damages caused by the two periods of delay, which resulted from (1) the necessity of Oncor’s relocating the utility poles and (2) the City of Lindale’s lowering the water main. Section 25 of the parties’ agreement states, in pertinent part, as follows:

25. HINDRANCES AND DELAYS

No charge shall be made by [Baker] for hindrances or delays from any cause (except where the work is stopped by order of the [County]) during the progress of any portion of the work embraced in this contract. In case said work shall be stopped by the act of the [County], then such expense, as in the judgment of the ENGINEER is caused by such stopping of said work, shall be paid by the [County] to [Baker].

Paragraph 3 of the contract sets forth that the word “Engineer” refers to “the County Engineer of Smith County, Texas, or his authorized representatives, including consulting engineers.”

Here, the County concedes in its brief that two “abatements,” i.e. time-stops, were ordered. But Brannon’s representative, Bryan Johnson, testified at his deposition that while time was “suspended” in response to the utility-poles obstruction, that meant work was suspended as well. And while he noted, as does the County in its brief, that some work occurred on the site during that time,⁴ he testified that the parties agreed that “it would be economically foolish for [Baker] to keep his forces [and] equipment on site . . . if the poles were still in the way[.]” Moreover, it is

⁴ Indeed, to the extent, as Baker argues, some work was required to maintain the integrity of the work already performed on the site, Special Condition 16 of the contract states that “[Baker] shall maintain, and keep in good repair, the improvements covered by these plans and specifications during the life of his contract.”

undisputed that Baker demobilized in January 2022 pending the City of Lindale’s relocation of the water main. And in an email to Brad Baker sent on April 12, 2022, Johnson states that since water services were relocated “[t]he project is ready for *work* to resume.” (emphasis added). Based on the foregoing, we conclude that there is more than a scintilla of evidence that the County twice ordered that work on the project be suspended, which equates to work’s being “stopped by the order of the [County]” during Baker’s progress of its work on the project as set forth in the unambiguous language of Section 25 of the contract. *See suspend*, THE AMERICAN HERITAGE DICTIONARY (2nd ed. 1982) (“suspend” means “[t]o cause to stop for a period”).

On April 26, 2021, Baker wrote a letter to Brannon regarding additional costs it incurred as a result of the first delay and requesting that it be paid for them. On January 18, 2022, Thomas Wilson, Smith County Assistant District Attorney - Civil Division, sent an email both to the Engineer and Baker, in which he stated that it was his understanding that (1) Baker and the Engineer were discussing Baker’s requested change order, (2) a portion of the requested amount likely would be incorporated into a change order, and (3) any remaining amount would be left pending until the finalization of the project or a future change order. On January 27, 2022, during the second period of work-suspension, Brad Baker emailed Brannon and others and sought to initiate a discussion about Baker’s delay expenses. We conclude that there was more than a scintilla of evidence that the Engineer and the County knew that Baker sought payment of expenses it suffered as a result of the delays.⁵

Breach

Section 51 of the contract sets forth, in pertinent part, as follows:

51. FINAL PAYMENT

Upon final acceptance of the completed work, the ENGINEER shall proceed to make final measurement and final statement of the value of all work performed and materials furnished under the terms of this agreement and provide such to the [County], who shall pay to [Baker] on or before the 15th working day after the date of final acceptance the balance due to [Baker] under the terms of this agreement, provided he has fully performed his contractual obligations under the terms of the contract; and said payment shall become due in any event upon said performance by [Baker].

⁵ Section 25 does not contain a formal notice requirement to request expenses under that section. Although Section 40 requires “questions of dispute or adjustment” to be presented by Baker in writing and filed with the Engineer, such questions refer only to circumstances in which the Engineer “has given any direction, order, or instruction to which [Baker] desires to take exception.” We conclude that any formal notice requirements under Section 40 do not apply to Section 25.

The parties do not dispute that the Engineer accepted Baker's completed work. Thus, in fulfilling his obligation to make the final measurement and statement of the value of all work performed and materials furnished under the contract, the Engineer was required to determine, in his judgment, the amount of the expenses Baker incurred, which were caused by the two suspensions of work ordered by the County. Thus, we conclude that when the Engineer failed to meet this obligation under the contract, the County had an obligation to compel him to comply with the terms of Section 25 to avoid breach.⁶ And further, once the time for final payment to Baker passed and the Engineer had not made the necessary determination as to Baker's incurred expenses under Section 25, the County was in breach of the agreement.

Damages

As set forth above, under Section 262.007, a county waives immunity from suit for a breach of contract claim of this type, and the plaintiff may seek to recover damages for the balance due and owed by the county under the contract. *See* TEX. LOC. GOV'T CODE ANN. §262.007(b)(1). In the instant case, Baker pleaded that it was entitled to recover additional costs and damages resulting from these delays, including multiple mobilizations, multiple efforts maintaining lines, grading, and stormwater protections, extensions to bonds and additional supervision costs. But since these delays resulted from County-ordered work-suspensions, Section 25 of the contract governs the calculation of these damages, if any, due and owed under the contract. And while Baker did not specifically plead that such damages, *as determined by the Engineer*, were recoverable, neither did the County offer any evidence of any final determination by the Engineer that there were no expenses due and owing to Baker caused by these County-ordered work-suspensions.

Baker points to Exhibit Y, an October 22, 2021 email from the Engineer to the County, which it contends sets forth certain amounts it is due as a result of these delays.⁷ But the County

⁶ It is reasonable to conclude under the unambiguous terms of Section 25 that, despite the contract's setting forth that determination of these expenses is left to the judgment of the County's Engineer, the County maintained control to compel its Engineer to exercise such judgment when Baker made it known that it sought to recover such expenses. To conclude otherwise would mean that the Engineer simply could decline to make such a determination, thereby allowing the County to avoid its obligation to pay such expenses, if any, which are due and owing. *See Reliance Ins. Co. v. Hibdon*, 333 S.W.3d 364, 369 (Tex. App.–Houston [14th Dist.] 2011, pet. denied) (in construing contract court of appeals should "avoid a construction that is unreasonable, oppressive, inequitable, or absurd").

⁷ Baker argues in its brief that while Exhibit Y demonstrates that the Engineer believes it is owed *some* amount in damages which resulted from these delays, it does not agree with the Engineer's calculations. However, we reiterate that Section 25 unambiguously dictates that the expenses owed as a result of County-ordered work-stoppages are left to the judgment of the Engineer. *See Birnbaum v. SWEPI LP*, 48 S.W.3d 254, 257 (Tex. App.–San Antonio 2001,

dismisses the import of this email and argues that it simply amounts to a County-requested, hypothetical calculation based on the assumption that Baker may be owed something for the delays. Whatever the evidentiary force of Exhibit Y may be, it undoubtedly was not used by the County to challenge the jurisdictional facts of any damages as expenses potentially due and owing to Baker under Section 25.

Summation

In sum, Section 25 sets forth that any expenses due and owing to Baker caused by these County-ordered work-suspensions are left to the judgment of the Engineer.⁸ All of the damages Baker seeks to recover allegedly were caused by these County-ordered suspensions. Thus, Section 25 of the contract governs. Because the County did not provide evidence from the Engineer that Baker is not entitled to recover any of its alleged expenses, such a jurisdictional fact was unchallenged in the County's plea to the jurisdiction. We reiterate that the County had the initial burden of proof to show the trial court lacks jurisdiction. *Pope*, 674 S.W.3d at 281. Because the County did not meet that burden with regard to expenses potentially due and owing under Section 25, Baker was not required to show that a genuine issue of material fact existed as to the amount of these expenses which it alleges were due and owing. *See id.* Moreover, to the extent that Baker's pleadings lacked specificity with regard to how Section 25 expenses must be determined, such an issue is one of pleading sufficiency, and Baker should have been afforded the opportunity to amend. *See Holland*, 221 S.W.3d at 643. Accordingly, we hold that the trial court erred in granting the County's plea to the jurisdiction on this basis.⁹ Baker's first and second issues are sustained in part.

pet. denied) ("Parties to a contract are masters of their own choices and are entitled to select what terms and provisions to include in or omit from a contract").

⁸ The County argues at length about whether Baker's compensation, based on its bid, is based on fixed cost or unit cost, as well as the purported inadequacy of Baker's proof of damages, as reflected in Brad Baker's affidavit and in Baker's expert's report. It argues that Baker's evidence is not reflective of "cost" or "amount owed," as required under Section 262.007(b), but instead, amounts to an extrapolation of data that does not prove actual cost incurred by Baker or amount owed under the agreement. However, these arguments have no applicability to any expenses incurred by Baker, which it seeks to recover under Section 25 since such expenses caused by the County-ordered work-stoppage, under the express, unambiguous language of the agreement, are to be determined by the Engineer.

⁹ Because all of Baker's alleged damages stem from the County's order that work be suspended, Section 25 of the parties' contract governs. Thus, we need not consider its arguments that it may recover increased cost to perform the work as a direct result of County-caused delays or the amount owed for additional work required to carry out the contract. *See* TEX. LOC. GOV'T CODE ANN. § 262.007(b)(1), (2) (West 2016).

DISPOSITION

Having sustained Baker's first and second issues in part, we *reverse* the trial court's order granting the County's plea to the jurisdiction and *remand* the cause for further proceedings consistent with the opinion of this court.

JAMES T. WORTHEN
Chief Justice

Opinion delivered December 10, 2025.

Panel consisted of Worthen, C.J., Hoyle, J., and Davis, J.



COURT OF APPEALS

TWELFTH COURT OF APPEALS DISTRICT OF TEXAS

JUDGMENT

DECEMBER 10, 2025

NO. 12-24-00347-CV

BAKER & COMPANY CONSTRUCTION, LLC,
Appellant
V.
SMITH COUNTY, TEXAS,
Appellee

Appeal from the 114th District Court
of Smith County, Texas (Tr.Ct.No. 23-0563-B)

THIS CAUSE came to be heard on the appellate record, oral arguments, and the briefs filed herein, and the same being considered, because it is the opinion of this court that there was error in the order of the court below, it is ORDERED, ADJUDGED, and DECREED by this court that the trial court's order granting Smith County's plea to the jurisdiction be **reversed** and the cause **remanded** to the trial court **for further proceedings** consistent with the opinion of this court, and that all costs of this appeal are hereby adjudged against the party incurring the same, for which execution may issue; and that this decision be certified to the court below for observance.

James T. Worthen, Chief Justice.
Panel consisted of Worthen, C.J., Hoyle, J., and Davis, J.